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CASE NO. 84-524

in the Supreme Court of the United States

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner

vs.

GENE L. and CATHY CAVANAUGH,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Respondents, GENE AND CATHY CAVANAUGH, have restated the question presented for review by the Petitioner herein, so that it is in conformity with the factual findings of the District Court, as affirmed by the United States Court of Appeals for the Eleventh Circuit.

WHERE THE INSURED VESSEL GOES BEYOND THE WARRANTED NAVIGATIONAL LIMITS OF THE INSURANCE POLICY BY REASON OF THE BARRATRY OF THE MASTER, WHICH RESULTS IN A TOTAL LOSS DUE TO FIRE AND GROUNDING, IS THE LOSS COVERED BY THE POLICY WHICH INSURES AGAINST LOSS DUE TO BARRATRY, FIRE AND GROUNDING?

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Arnould's Law of Marine Insurance and Average, Sec. 692 (16th ed. 1981)	2

STATEMENT OF THE CASE

The *only* pertinent and material facts that are necessary for consideration are the following:

1. Petitioner's insurance policy provided insurance coverage for losses due to barratry, fire and grounding.

2. The policy provided that it was "warranted" that the vessel would be operated only within certain specified areas.

3. The vessel was outside the navigational limits at the time of the loss by reason of the barratry of the master.

4. The barratrous acts on the part of the master directly resulted in the grounding, fire and destruction of the insured vessel.

ARGUMENT IN OPPOSITION TO PETITION

Respondents would respectfully submit that there is no basis, indeed, no special or important reason for this Court to allow the Petition and accept jurisdiction over this case. The Eleventh Circuit's opinion that Petitioner seeks to have reviewed is not in conflict with another Federal Court of Appeal's decision and does not otherwise depart from the accepted and usual course of judicial proceedings. 28 U.S.C., Supreme Court Rules, Part V, Rule 17.

Petitioner contends that the Eleventh Circuit opinion is in conflict with *Wilburn Boat v. Fireman's Fund*

Insurance Co., 201 F.2d 833 (5th Cir. 1953), *rev'd on other grounds*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1954), and, *Home Insurance Company v. Ciconett*, 179 F.2d 892 (6th Cir. 1950). Both of these cases involved a breach of an express warranty in the insurance policy. For that reason alone, it is clear that there can be no conflict with the Eleventh Circuit opinion here. Very simply, even assuming that the navigational limits (as stated in the policy) constituted a "warranty"[1], there was no breach. Both the District Court and the Eleventh Circuit found that the vessel, at the time of the loss, was beyond the navigational limits by reason of the barratry of the master, a peril specifically insured against by Petitioner's policy.

Barratry has been defined as constituting an act committed by the master for some unlawful or fraudulent purpose, contrary to his duties to the owner. *Darien Bank v. Travelers Indemnity Company*, 654 F.2d 1015, 1019 (5th Cir. 1981). The deliberate act of the master in causing the vessel to deviate from its proper or agreed upon course to the detriment of the owner falls within the scope of this definition. *Whorton v. Home Insurance Company*, 724 F.2d 427, 431 (4th Cir. 1984); *United States Fire Insurance Company v. Cavanaugh*, 732 F.2d 832 (11th Cir. 1984); *Nautilus Virgin Charters v. Edinburgh Insurance Company*, 510 F.Supp. 1092, 1095, (D.Md.

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[1]The policy provision stated as follows: "Warranted navigation confined to U.S. coastal and inland tributory waters from Cape Hatteras, N.C. to Brownsville, Texas, both inclusive, but not to exceed 150 miles offshore therefrom." Arnould considers such a provision to be an *exception* to coverage rather than a true promissory warranty. *Arnould's Law of Marine Insurance and Average*, Sec. 692 (16th ed. 1981).

1981), *aff'd mem.*, 673 F.2d 1314 (4th Cir. 1981), *cert. denied*, 456 U.S. 945, 102 S.Ct.2012, 72 L.Ed.2d 468 (1982). *See also, Ope Shipping Ltd. v. AllState Insurance Company*, 521 F.Supp.342 (S.D.N.Y. 1981), *aff'd in part, rev'd in part*, 687 F.2d 639 (2d Cir. 1982), *cert. denied*, 460 U.S.1069, 103 S.Ct. 1523, 75 L.Ed.2d 946 (1983).

In concluding that the barratry of the master (in this case) did not constitute a breach of the so-called navigational warranty, both courts were giving full force and effect to the terms and conditions of the Petitioner's policy. The result was not an extension—let alone an unjustified one—of the insurance coverage as the Petitioner would suggest. This is not a situation where the barratrous act of the master commenced *after* the vessel was beyond the navigational limits. Rather, it was *only* because the policy contained such a "warranty", that the deliberate act of the master (in taking the vessel beyond the agreed upon limits) was barratrous.[2] *Nautilus Virgin Charters, supra.*

If Petitioner had not intended to insure against barratry, or even the particular form or mode (as in this case), such an intention should have been expressed in the policy. It was not. Nor is it reasonable to suppose —as does Petitioner—that the navigational warranty negates barratry as a covered peril. It would produce

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[2]If there were no proscribed areas, there could not have been deviation, and thus no "unlawful or fraudulent" act detrimental to the owner. Clearly then, the barratry commenced while the vessel was still within the warranted limits. *See, Whorton, supra*, 724 F.2d at 430.

an absurd result which the parties could not have intended.[3]

The Eleventh Circuit found that the barratry was "connected to the ultimate cause of the loss (here, fire)", 732 F.2d at 835, n.2, a peril specifically insured against in Petitioner's policy. Clearly, once the vessel went beyond the navigational limits, the barratry did not suddenly cease. Rather, it continued until the vessel was ultimately destroyed by fire (and grounding).[4]

In sum, not only was the ultimate cause of the loss a peril (fire) insured against, but it was a consequence of or a direct result of another peril (barratry) insured against. Compare, those cases involving barratry where the losses were held not to be covered[5], either, because the ultimate cause of the loss was a peril specifically *excluded*, *Cory v. Burr*, [1883] A.C. 393 (seizure), *Nautilus Virgin Charters, supra* (seizure), *Flota Merchants Dominica v. American Manufacturers Mutual Insurance Co.*, 312 F.Supp.58 (S.D.N.Y. 1970) (war risks), *or*, because the ultimate cause of the loss was a direct result or consequence of a peril specifically *excluded*. *Republic of China v. National Union Fire Insurance Co.*, 151 F.

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[3]In effect, it would be tantamount to excising barratry as a peril insured against in Petitioner's policy.

[4]Indeed, the very concept of barratry requires an act contrary to the owner's interest which results in an injury (loss) to the owner. *Fishing Fleet, Inc. v. Trident Insurance Co., Ltd.*, 598 F.2d 925, 927 (5th Cir. 1979).

[5]Under marine risk policies identical to Petitioner's policy in this case.

Supp. 211 (D.Md. 1957), *aff'd*, 254 F.2d 177 (4th Cir.), *cert. denied*, 358 U.S. 823, 79 S.Ct. 38, 3 L.Ed.2d 64 (1958) (civil war), *Ope Shipping, Ltd, supra* (civil war).

Accordingly, if barratry is to have any meaning at all as a specified peril insured against, it is in a case such as this. The barratry neither occurred by reason of a peril excluded in Petitioner's policy (as in *Republic of China, supra*), nor produced or caused a loss by reason of a peril excluded in Petitioner's policy (as in *Nautilus Virgin Charters, supra*). As the Eleventh Circuit reasoned here:

> To hold otherwise would be to find that one covered peril could operate to relieve the insurer of any loss which occurred from another covered peril. 732 F.2d at 835.

Indeed, having agreed to undertake and insure against barratry, grounding and fire, Petitioner's policy must be enforced as written—*not as construed by Petitioner.* The Respondents would therefore respectfully submit that the Eleventh Circuit correctly affirmed the decision of the District Court finding Petitioner liable under the policy.

There being no basis to support a review of the Eleventh Circuit opinion, this Court, in the proper exercise of its discretion, should deny the Petition for Writ of Certiorari.

CONCLUSION

Based upon the foregoing argument and citations of authorities, it is respectfully submitted that the Petitioner has failed to sustain its burden in accordance with Rule 17, and accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 29th day of October, 1984, served three copies of the foregoing Brief In Opposition to Petition for Writ of Certiorari to: Christian D. Keedy, Esquire, Counsel for Petitioner, 1301 Alfred I. duPont Building, Miami, Florida 33131.

JOHN D. KALLEN